

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**

IN THE MATTER OF THE COMPLAINT OF KIRBY INLAND MARINE, LP OWNER OF THE M/V MISS SUSAN, KIRBY 27705, KIRBY 27706 PETITIONING FOR EXONERATION FROM OR LIMITATION OF LIABILITY	* * * * * * *	CIVIL ACTION NO. 14-1321 ADMIRALTY Pursuant to Rule 9(h) of the Federal Rules of Civil Procedure

Consolidated with

IN RE: SEA GALAXY MARINE SA, AS OWNER OF THE M/V SUMMER WIND PETITIONING FOR EXONERATION FROM OR LIMITATION OF LIABILITY	* * * * *	CIVIL ACTION NO. 14-134

**PETITIONER KIRBY INLAND MARINE, LP'S
RESPONSE TO PETITIONER CLEOPATRA SHIPPING
AGENCY, LTD'S MOTION FOR ORDER APPROVING
PETITIONERS' AFFIDAVIT OF VALUE AND AMENDED
AD INTERIM STIPULATION/LETTER OF UNDERTAKING**

TO THE HONORABLE GREGG J. COSTA:

Petitioner in Limitation and Claimant Kirby Inland Marine, L.P. ("Kirby") respectfully submits its Response to Intervenor-Petitioner Cleopatra Shipping Agency, Ltd's ("Cleopatra") Motion for Order Approving Petitioners' Affidavit of Value and Amended *Ad Interim* Stipulation/Letter of Undertaking.

In jointly moving for the Court to approve Petitioners' Affidavit of Value and Amended *Ad Interim* Stipulation/Letter of Undertaking, Petitioner Sea Galaxy Marine, S.A. ("Sea Galaxy") and Cleopatra contend that they are entitled to seek

this relief under 46 U.S.C. § 30501 *et seq.* and Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure by virtue of the fact that Sea Galaxy and Cleopatra are owners and/or owners *pro hac vice* of the M/V SUMMER WIND. Kirby does not object to the form of Petitioners' Affidavit of Value and Amended *Ad Interim* Stipulation/Letter of Undertaking, and the Court has previously ruled on the valuation of the M/V SUMMER WIND included in those documents. Kirby further does not contest Sea Galaxy's right to move for the Court's approval of the affidavit and stipulation. However, Kirby does object to the entry of any order indicating that Cleopatra, which had a management agreement with the owner of the M/V SUMMER WIND, is an owner or owner *pro hac vice* of the M/V SUMMER WIND or otherwise entitled to the protections of a limitation proceeding.

Indeed, 46 U.S.C. § 30501 defines an owner *pro hac vice* to include "a charterer that mans, supplies, and navigates a vessel at the charterer's own expense or by the charterer's own procurement."¹ To qualify as an owner *pro hac vice*, a party must demonstrate that it maintained possession, command, and navigation of the vessel.² Without such control of the vessel, including the ability to choose

¹ 46 U.S.C. § 30501.

² See *Guzman v. Pichirilo*, 369 U.S. 698, 699 (1962) ("To create a demise the owner of the vessel must completely and exclusively relinquish 'possession, command, and navigation' thereof to the demise. It is therefore tantamount to, though just short of, an outright transfer of ownership. However, anything short of such a complete transfer is a time or voyage charter party or not a charter party at all"); see also *Coakley v. Seariver Maritime, Inc.*, 319 F. Supp. 2d 712, 716 (E.D. La. 2004) ("The Fifth Circuit has ruled that the burden is on the party seeking to establish a

cargo and use a vessel for a charterer's own economic purposes, a party is not an owner *pro hac vice* for the purpose of a limitation of liability action.³ Here, Cleopatra's contract with Sea Galaxy (the "Agreement"),⁴ which provides for Cleopatra to provide "limited chartering services" for Sea Galaxy in exchange for a management fee, indicates that Cleopatra did not possess the degree of control or autonomy over the M/V SUMMER WIND required to be an owner *pro hac vice*. Rather, Cleopatra operated the vessel at the direction of Sea Galaxy and non-party Dome Chartering. For example, under section 6, "Commercial Management," the Agreement states that Cleopatra's commercial management of the vessel is "ancillary to those services provided by Dome Chartering *who shall remain ultimately responsible for the commercial management* by a separate agreement."⁵ By the terms of the Agreement, Cleopatra does not have ultimate control over the management of the vessel: Cleopatra carries the cargo it is

demise charter is heavy, for courts are reluctant to find a demise when the dealings between the parties are consistent with any other relationship").

³ See *Forrester v. Ocean Marine Indem. Co.*, 11 F.3d 1213, 1215 (5th Cir. 1993) ("The distinction between the demise and non-demise charters depends on the degree of control retained by the owner of the vessel"); *Kerr-McGee Corp. v. Ma-Ju Marine Servs., Inc.*, 830 F.2d 1332, 1342-43 (5th Cir. 1987) (noting that "full possession and control" of a vessel are key components to ownership *pro hac vice*); *Ducote v. Int'l Operating Co.*, 678 F.2d 543 (5th Cir. 1982) (holding that bailee is not an owner *pro hac vice*, partially because it did not have authorization to use a barge for "its own purposes in maritime commerce"); *Bossard v. Port Allen Marine Serv., Inc.*, 624 F.2d 671, 673 (5th Cir. 1980) (same).

⁴ The Agreement is attached as "Exhibit 1" to Cleopatra's Verified Complaint and Petition for Exoneration From or Limitation of Liability.

⁵ Cleopatra Pet. Ex. 1, p. 000010, Clause 6, ECF No. 428, C.A. No. 14-00134 (emphasis added). Such commercial management services include "seeking and negotiating employment for the Vessel" in accordance with Sea Galaxy Marine, S.A.'s instructions, "arranging for the provision of bunker fuels of the quality specified by [Sea Galaxy Marine, S.A.], "voyage estimating and accounting and calculation of hire, freights, demurrage, and/or dispatch monies", "issuing voyage instructions", "appointing agents", "appointing stevedores", and "arranging surveys associated with the commercial operation of the vessel." Cleopatra Pet. Ex. 1, p. 000010-11, Clause 6, ECF No. 428, C.A. No. 14-00134.

instructed to carry, uses the fuels it is instructed to use, and travels where it is instructed to travel. Moreover, under the Agreement, Sea Galaxy, not Cleopatra, financed the operations and expenses of the M/V SUMMER WIND.⁶ As such, Cleopatra did not “man, supply, and navigate the vessel at its own expense or by its own procurement,” as is customary with an owner *pro hac vice*. Because Sea Galaxy did not transfer complete possession, control, and navigation to Cleopatra, Cleopatra is not the owner *pro hac vice* of the M/V SUMMER WIND, and is not eligible for limitation of liability protections.⁷

Respectfully Submitted,

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⁶ Cleopatra Pet. Ex. 1, p. 000005, Annex “C”, ECF No. 428, C.A. No. 14-00134

⁷ See *Guzman*, 369 U.S. at 700

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am a member of Stepp & Sullivan, P.C., and that a true and correct copy of the foregoing document was served on counsel of record as noted below and was electronically filed with the Clerk of the Court for the United States District Court for the Southern District of Texas via the CM/ECF system, which provides notice to all counsel of record on this, 22nd day of October 2014.

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